89-1241

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ETHEL ROBINSON; BETTY HICKS;
EDWARD DAVIS; TED IWASZKIW;
SANTOS CARABALLO

Petitioners,

vs.

DINNER BELL MEATS; UNITED FOOD &
COMMERCIAL WORKERS LOCAL 880;
JOSEPH MADZELONKA, President
RAY DESANTIS, Exec. Vice-President;
JOHN R. BARTLETT, Secretary-
Treasurer; DAN WELSH, Recorder;
FIRST NATIONAL SUPERMARKETS, INC.
(Pick-n-Pay Supermarkets Division)

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the dual standard of federal labor law accrual of the federal labor law six-month statute of limitations, allowing the Federal Courts to selectively apply to Union members in a 29 USCS § 185 action, either a six-month statute of limitations, beginning after the rendering of an arbitrator's decision or beginning when the claimant knows or should have known of the Union's alleged breach of its fair representation, violate both the due process clause and the equal protection of the laws section of the due process clause of the Fifth Amendment to the U. S. Constitution, where the United States Supreme Court has specifically denied Union members the right to counsel during the grievance and arbitration

procedure as a quid pro quo for their right of action against the Union and employer?

2. Does the Union breach its duty of fair representation as a matter of law, rendering the arbitrator's decision a nullity, when it fails to reserve the issue of the non-signatory's obligation to arbitrate by first applying to the United States Federal District Court before proceeding to arbitration, when the non-signatory to the collective bargaining agreement has refused to be a party to the arbitration or participate therein, and there is only an equivocal oral agreement, between the counsel for the non-signatory and a Union officer, neither with authority to bind the parties, that the non-signatory agreed to be bound by the outcome of the arbitra-

tion, and the non-signatory successor joint employer denies any liability whatsoever under the collective bargaining agreement in its Answer to Petitioners' Complaint?

3. Where Petitioners had signed waivers in 1972 of their right to return to Pick-n-Pay, believing it was intended to resolve an immediate revolving door problem, and continued to negotiate and obtain in every subsequent collective bargaining agreement their right to return to Pick-n-Pay in the event of a reduction in force at Dinner Bell Meats,--did the successor joint employer, First National Supermarkets, Inc., upon taking over in 1977, by its conduct in unsuccessfully attempting in good faith collective bargaining, to remove the reduction in force clause

from the collective bargaining agreement, reestablish unequivocally Petitioners' rights under the negotiated collective bargaining agreement to return to Pick-n-Pay, upon a reduction in force at Dinner Bell Meats, as a matter of law, notwithstanding the earlier waivers of the Petitioners?

4. Do Petitioners have an equitable right and therefore standing to seek a vacation of an arbitration award against them under federal labor law, for the Union's failure to first apply to the U.S. District Court when the non-signatory to the collective bargaining agreement refuses to be a party to the arbitration or participate therein, and the Union, notwithstanding, having arbitrated, refuses to appeal the arbitration decision?

5. Do the Petitioners in a class arbitration of their grievance have a right as a matter of law under 29 USCS § 185, 29 USCS § 411, and the Due Process Clause of the Fifth Amendment to the United States Constitution, when read separately or in pari materia, to have one member of their class in attendance at their arbitration hearing, where the Statute of Limitations in their breach of duty of fair representation action accrues "when the Union employees knew or should have known of the Union's breach of duty of fair representation?"

PARTIES

The Petitioners to this action are:

Ethel Robinson, Betty Hicks, Edward Davis, Ted Iwaszkiw and Santos Caraballo.

The Respondents to this action are:

Dinner Bell Meats; United Food & Commercial Workers Local 880; Joseph Madzelonka, the President; Ray DeSantis, the Exec. Vice-President; John R. Bartlett, the Secretary-Treasurer; Dan Welsh, the Recorder; First National Supermarkets, Inc. (Pick-n-Pay Supermarkets Division).

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I. The Lack of a Decision From The U.S. Supreme Court Declaring a Uniform Rule in Labor Cases as to the Accrual of the Statute of Limitations to Conform With the Uniform Statute of Limitations Adopted in Del Costello v. Teamsters, 462 US 151, Has Created a Dual Standard in the Courts Below That Has Substantially Prejudiced the Petitioners and Denied Them as Well as Others Similarly Situated, the Equal Protection of the Law Under the Due Process Clause of the Fifth Amendment to the United States

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Constitution.

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II. The Appearance of Fairness and Due Process Concepts Require This Court to Determine Whether in a Class Arbitration of a Grievance, One Member of That Class is Permitted to be Present as a Matter of Law at Their Arbitration Hearing, Where the Statute of Limitations In a Breach of Duty of Fair Representation Action Accrues "When the Union Employees Knew Or Should Have Known of the Union's Breach of Duty of Fair Representation."

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STATUTES INVOLVED:

28 USCS § 1254

29 USCS § 185

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the U.S. Court of Appeals
For the Sixth Circuit

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this matter on October 5, 1989

and the judgment and opinion that it rendered on November 2, 1989 on Petitioners' Petition For Rehearing.

OPINIONS BELOW

The October 5, 1989 opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, appears in the Appendix attached hereto at Appendix page A-47. Its opinion denying Petitioners' Petition For Rehearing sought to be reviewed appears at Appendix page A-59.

The United States District Court For the Northern District of Ohio is attached in the Appendix at Appendix page A-1.

None of the opinions are reported opinions.

JURISDICTION

The final judgment of the District Court for the Northern District of Ohio, Eastern Division, was entered on December 1, 1988. A Notice of Appeal to the U.S. Court of Appeals for the Sixth Circuit was filed by Petitioner on December 22, 1988, appealing the December 1, 1988 final judgment of the District Court.

The final judgment of the U.S. Court of Appeals for the Sixth Circuit was entered on October 5, 1989.

Petitioner's Motion for Reconsideration filed within ten (10) days of the October 5, 1989 Order was denied by the U.S. Court of Appeals for the Sixth Circuit on November 2, 1989.

The Petitioner, requests the review of the opinion of the U.S. Court of Appeals for the Sixth Circuit, af-

firming the U.S. District Court for the Northern District of Ohio's E.D. summary judgment in favor of the Respondents and denial of Petitioners' Motion for Rehearing.

This petition for writ of certiorari is filed within ninety (90) days of the November 2, 1989 final judgment of the U.S. Court of Appeals for the Sixth Circuit upon Petitioners' Motion for Rehearing.

This Court's jurisdiction is invoked pursuant to 28 USCS § 1254(1).

The basis for jurisdiction in the Federal District Court in the first instance arises under 29 USCS § 185, 29 USCS § 411, and the Fifth Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, excapt in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES INVOLVED

Federal Statutes 28 USCS § 1254, 29 USCS § 185, and 29 USCS § 411(a).

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28 USCS § 1254. Courts of appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

29 USCS § 185, Suits by and against labor organizations.

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent--Entity for purposes of suit--Enforcement of money judgments. Any labor organizationwhich represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against

labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.
(June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.)

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

29 USCS § 411, Bill of rights; constitution and bylaws of labor organizations.

(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.
(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings; Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.
(3) Dues, initiation fees, and assess-

ments. Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act [enacted Sept. 14, 1959] shall not be increased, and no general or special assessment shall not be increased, and no general or special assessment shall be levied upon such members, except--

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations; (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constitutent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar

governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization; Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator; Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof; And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, sus-

pended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws. Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.
(Sept. 14, 1959, P.L. 86-257, Title I, § 101, 73 Stat. 522.)

STATEMENT OF THE CASE

First National Supermarkets (FNS), a non-signatory, owned the trade name "Pick-n-Pay" under which they operated retail supermarkets. FNS was a successor joint employer of Dinner Bell Meats (DBM) that denied, in its Answer to Petitioners' Complaint, that it had any liability whatsoever to the Collective Bargaining Agreement between DBM and the Union, United Food & Commercial Workers Local 880. The Executive Vice President for the Union denied on deposition that there was any agreement between FNS and the Union with respect to the arbitration. The issue of whether FNS, a non-signatory, was required to be a party to the arbitration was never presented to the arbitrator, and the arbitrator rendered

no decision with respect thereto. The The Petitioners contended in the Brief submitted to the Court below that the Union breached its duty of fair representation by failing to go to the U.S. District Court and determine whether FNS, a non-signatory joint successor employer, was required to arbitrate under the authority of AT&T Technologies v. Communication Workers, 475 US 643. This case controlled the rights of the parties since it authorizes and delegates to the U.S. District Court the exclusive right to determine the question as to whether the CBA between DBM and the Union which contained a proviso in the CBA that the Petitioners had a right to return to Pick-n-Pay upon a reduction in force at DBM since FNS was a non-signatory joint successor employer and a party to the CBA. The

exception to this is where the parties clearly and unmistakably provide otherwise. The Respondents attempted to but failed.

The Union and FNS evidenced that the Executive Vice President of the Union had an oral agreement with counsel for FNS that FNS would be bound by the outcome of the arbitration but would not appear therein. Petitioners submitted that this failed to meet the clear and unmistakable standard when the Union officer testified he had no agreement with FNS but just with its counsel, and FNS in its Answer denied liability under the CBA and it was not formally adopted by the parties. Petitioners pointed to a Termination Agreement of the CBA exe- by the Union, after a membership vote, prior to the plant closing while the grievance was pending, but before the arbitration hearing wherein all of the

Petitioners' rights to pursue any grievance of any kind whatsoever were released.

Petitioners relied on Service Hospital v. Commercial Property Service, Inc., 755 F2d 499 at 506 (Sixth Cir., 1985) that held that where no rights or duties of the non-signatory are stated in the terms and conditions of the contract the District Court does not have subject matter jurisdiction over a CBA. The CBA between the Union and DBM did not contain any rights or duties of FNS.

Petitioners submitted that FNS could therefore not confer jurisdiction on the arbitrator by consenting to such an oral agreement. Further, that the arbitrator was without jurisdiction if the Federal District Court was without jurisdiction.

Petitioners submitted that the

Union and FNS were pari delicts by not clearly and unmistakably providing a commitment that FNS was a party to the arbitration. The Petitioners contend that the failure to present to the arbitrator such a written commitment gave the arbitrator no choice but to rule against Petitioners since he could not make an award against an employer who was not a party to the arbitration. Further, the arbitrator was not aware that FNS had an oral agreement to be bound by the outcome of the arbitration.

Petitioners maintained that the Union had a fiduciary duty of disclosure to Plaintiff-Appellants with respect to the non-party status of FNS to the arbitration, and breached it. Further, Petitioners were sequestered outside the Hearing Room without a class representative and had no way of knowing of

the non-party status of FNS to the arbitration until the arbitrator published his opinion on December 17, 1986. The arbitration was conducted without a record. Petitioners had filed their Complaint in the U.S. District Court for breach of duty of fair representation, less than three (3) months after the arbitrator's decision. The U.S. Court of Appeals for the Sixth Circuit affirmed the Summary Judgment of the U.S. District Court for the Northern District of Ohio, Eastern Division, on the basis that Petitioners' Complaint was barred by the Federal Statute of Limitations of six (6) months that accrued before the arbitrator's decision when the Petitioners knew or should have known that the Union breached its duty of fair representation.

Petitioners filed a Petition For

Rehearing contending that the application of the accrual doctrine of the six-month statute of limitations to a period prior to the arbitrator's decision is an unconstitutional application thereof and deprived Petitioners due process of the Fifth Amendment of the United States Constitution because as a matter of federal labor law policy by U. S. Supreme Court decisions they are denied the right to their own counsel during the grievance-and-arbitration process. The Court was requested to apply the traditional accrual of the statute of limitations that has been traditionally used in other U. S. Courts of Appeals that the cause of action does not accrue until the arbitrator renders his decision. Petitioners

relied on Acri v. International Ass'n of Machinists, 781 F2d, 1393 at page 1396.

The Petitioners were Union employees working in a retail food supermarket under a trade name Pick-n-Pay in 1970, that was owned and operated by Cook United, Inc. In 1971 it opened a wholesale meat processing plant to service its stores under the corporate name of Dinner Bell Meats.

Employees at Pick-n-Pay were transferred to DBM under a CBA at DBM that provided that Pick-n-Pay employees could use their seniority to transfer back to Pick-n-Pay from DBM.

A substantial number of employees transferred back to Pick-n-Pay, creating a revolving door situation. Petitioners were presented waivers in 1972 which they signed, the purpose of which was solely to curtail the revolving door

situation.

In the original and subsequent DBA's at DBM there remained in full force and effect a reduction in force proviso that permitted Petitioners to return to Pick-n-Pay with seniority in the event there was a reduction in force or a plant closing.

In 1977 FNS became a joint successor employer of DBM and acquired control of the Pick-n-Pay supermarkets. FNS in that capacity during collective bargaining attempted to remove the reduction in force clause from the CBA between the Union and DBM. Under federal labor law, FNS had a right to insist on the removal of the reduction in force clause from the CBA. Petitioners submitted that this re-established Petitioners' rights thereto, notwithstanding the earlier waivers since

good faith collective bargaining required FNS to assert those waivers if it was going to rely on them. FNS did not assert those waivers.

The Petitioners further contended that the Union breached its duty of fair representation at the Arbitration Hearing when its expert labor lawyer ignored this issue which Petitioners' contend was their only winning issue if FNS was a party to the arbitration, especially when there was a witness for the Petitioners known to the Union lawyer, ready, willing and able to testify, on that issue.

REASONS FOR GRANTING THE WRIT

I. THE LACK OF A DECISION FROM THE U.S. SUPREME COURT DECLARING A UNIFORM RULE IN LABOR CASES AS TO THE ACCRUAL OF THE STATUTE OF LIMITATIONS TO CONFORM WITH THE UNIFORM STATUTE OF LIMITATIONS ADOPTED IN DEL COSTELLO v. TEAMSTERS, 462 US 151, HAS CREATED A DUAL STANDARD IN THE COURTS BELOW THAT HAS SUBSTANTIALLY PREJUDICED THE PETITIONERS AND DENIED THEM AS WELL AS OTHERS SIMILARLY SITUATED, THE EQUAL PROTECTION OF THE LAW UNDER THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Court Below Decided An Important Federal Question In A Way That Conflicts With The Spirit Of The Applicable Decisions Of The Supreme Court, That Has Not Been, But Should Be Settled By The Supreme Court.

The Petitioners filed their breach of duty of fair representation action in the United States District Court within three months after the arbitrator rendered his decision. The Court of Appeals affirmed the United States District Court's dismissal of Petitioners' action

as being barred by the Statute of Limitations upon finding that the Petitioners knew or should have known that the Union breached its duty of fair representation prior to the rendering of the arbitrator's decision.

The United States Court of Appeals for the various Circuits apply both the traditional rule with respect to the accrual of the statute of limitations by finding that a breach of duty of fair representation action accrues at the time of the arbitrator's decision while at other times they apply by the rule that the statute of limitations accrues when the Union employees knew or should have known that the Union breached its duty of fair representation.

The United States Supreme Court has made it clear that during the grievance-and-arbitration proceeding

that the Union employees are not entitled to their own counsel but must rely solely on the Union representation. The quid pro quo for the Union employees' deprivation of their due process right to counsel is their right of action under 29 USCS § 185 known as the breach of duty of fair representation.

As pointed out in Del Costello, supra., at 462 US, 166, the Union employee is called upon within the limitations period, to evaluate the adequacy of the Union's representation, to retain counsel, to investigate substantial matters that were not at issue in the arbitration proceeding and to frame his suit.

By placing the burden on the Union employee to evaluate the adequacy of the Union's representation during the limitations period in a legal context where

a Federal right of action accrues when a Union employee knew or should have known of the facts, such burden violates his right to due process.

The Court on page 166 was well aware that the Union employee is often unsophisticated in collective bargaining matters and is really incapable of making an informed judgment with respect thereto. The Court on page 166 only authorizes the employee to retain counsel to investigate substantial matters that were not at issue in the arbitration proceeding and to frame his suit.

In Petitioners' case, there was a written Termination Agreement releasing to the employer grievants' rights to arbitrate and pursue their grievance prior to the closing of the Plant, while their grievance was pending. Notwithstanding, the Union advised Petitioners

that they could arbitrate their grievance. They relied on that, and exhausted their contractual arbitration remedy.

In so doing, the Union did not get to the arbitration until approximately 10 months after the grievance was filed. After the filing of the grievance the Petitioners did not obtain the arbitrator's decision until 17 months later. The Court below had decided that it was during that time that the statute of limitations had expired, unbeknownst to Petitioners. This decision destroys the trust and repose Union employees are directed by Supreme Court law to place in their Union representatives during the course of the grievance and arbitration process. It is sure to create additional litigation when the word gets out that Union employees must file their

breach of duty of fair representation action during the grievance arbitration proceedings in order to protect their rights.

Petitioners' grievance-and-arbitration involved their right to return to Pick-n-Pay that was controlled by First National Supermarkets, Inc. (FNS), a non-signatory to the Collective Bargaining Agreement (CBA). There was no agreement between the Union and FNS that FNS would honor the outcome of the arbitration. The Union never went to the United States District Court to determine whether the non-signatory was required to arbitrate as required by AT&T Technologies v. Communication Workers, 475 US 643. They proceeded with the arbitration on an oral agreement between the Union Executive Vice President and counsel for both the signatory and

non-signatory. The issue of whether the non-signatory was to be a party to the arbitration or be bound by the outcome of the arbitration was never presented to or decided by the arbitrator and consequently was not reviewable de novo by the Court since the arbitrator's decision is usually final except for an abuse of discretion. No issue, no abuse.

Petitioners contend that such an agreement is not a clear and unmistakable agreement required by Federal labor law.

At the arbitration, no record was made nor was any provision made for one of the Petitioners to act as a class representative at the Arbitration Hearing and the Petitioners and their witnesses were sequestered outside the Hearing Room. Only two of them were permitted to testify for 5-10 minutes.

There is no way under these cir-stances where the Petitioner Union employees could by themselves adequately assess the adequacy of the Union repre-sentation.

The application of the accrual statute of limitations rule of "when they knew or should have known" while they were deprived of their own legal counsel as a matter of Supreme Court law with respect to the grievance-and-arbitration is a denial of the equal protection of the laws of the due process clause of the Fifth Amendment to the United States Constitution.

Petitioners state that the following cases discuss or apply the traditional standard of the accrual statute of limi-tations of six months after the date of the arbitrator's decision.

Santos v. District Council of

United Brotherhood of Carpenters, 619 F2d 969 (2d Cir., 1980). It states in a straight forward case a cause of action accrues on the date of the award. Also, the cause of action accrues when Plaintiff could have first successfully maintained a suit based on that cause of action.

Acri v. International Association of Machinists, 781 F2d, 1393 (9th Cir., 1986) 1396. A cause of action does not accrue at the time Plaintiff becomes aware of a wrong if at that time the Plaintiff's damages are not certain to occur or too speculative to be proven. Footnote 1 on page 1396, "...Plaintiff's cause of action did not accrue until the arbitrator rendered his decision, the District Court applied the traditional approach to accrual in breach of duty of fair representation cases under which

a cause of action does not accrue until the Union and the employer 'resolve the grievance or terminate further consideration of it.'"

Adkins v. International Union of Electrical Radio & Machinists, 769 F.2d 330 at 336 (6th Cir.). In a non-grievance context the Court acknowledged there was no accrual of the limitations period so long as the Union employees made a valid timely and non-frivolous attempt to pursue their contractual remedies in reasonable good faith.

The Sixth, Seventh, Eighth and Eleventh Circuits in the following cases have adopted the non-traditional accrual rule that the limitations period begins to run "when the claimant knows or should have known of the Union's alleged breach of its duty of fair representation."

Dowty v. Pioneer Rural Elec. Coop., Inc., 770 F.2d 52, 56 (6th Cir.) cert. denied, 474 US 1021 (1985); Metz v. Tcotsie Roll Industry, 715 F.2d 299, 304 (7th Cir., 1983), cert. denied, 464 US 1070; Alcorn v. Burlington Northern R. Co., 878 F.2d 1105 (8th Cir., 1989); Howard v. Lockeed-Georgia Co., 742 F.2d 612, 614 (11th Cir., 1984).

It is obvious from the foregoing cases that there is a conflict in the Circuits and a lack of a uniform federal labor policy as to when the statute of limitations accrued in Petitioners' rather common circumstances.

II. THE APPEARANCE OF FAIRNESS AND DUE PROCESS CONCEPTS REQUIRE THIS COURT TO DETERMINE WHETHER IN A CLASS ARBITRATION OF A GRIEVANCE, ONE MEMBER OF THAT CLASS IS PERMITTED TO BE PRESENT AS A MATTER OF LAW AT THEIR ARBITRATION HEARING, WHERE THE STATUTE OF LIMITATIONS IN A BREACH OF DUTY OF FAIR REPRESENTATION ACTION ACCRUES "WHEN THE UNION EMPLOYEES KNEW OR SHOULD HAVE KNOWN OF THE UNION'S BREACH OF DUTY OF FAIR REPRESENTATION."

All five Petitioners, upon the employer's motion, were sequestered outside the Hearing Room by the arbitrator's order. Only the Union's attorneys were present on behalf of the Petitioners. No record was made. In a hearing lasting all day, only two Petitioners were called for testimony lasting about 10 minutes.

Petitioners not being parties to the arbitration were lawfully excludable. Their rights were adjudicated out of their presence without any ability on their part to assess the adequacy of the Union's representation in the Hearing Room. Even sophisticated Union employees cannot, in any way assess the adequacy

of the Union's representation, unless at least one member of their class directly witnesses the presentation of the case or their personal attorney is in attendance which is presently prohibited by law, except at the NLRB.

Certainly when a Union proceeds with a class arbitration the appearance of fairness requires that it not be done in secret between the employer and the Union, especially in this case, when the arbitrator had a special friendship relation with the employer non-signatory.

29 USCS § 411, the Union Members' Bill of Rights provides for freedom of speech and presumably by implication, freedom of hearing, but has been applied solely to Union business meetings, based on the legislative history and Court interpretation.

It would seem that congressional

intent to provide a Union member with a Bill of Rights to insure Union democracy with Union business would abandon such intent when the Union representative walked into the Hearing Room for an arbitration involving those Union members.

Conduct may very well violate both Union members' Bill of Rights in 29 USCS §411 of this Title and also the duty of fair representation in 29 USCS § 185, Aguirre v. Automotive Teamsters, C.A. Cal. 1980, 633 F2d 168.

Petitioners sought declaratory relief by way of motion in the U. S. District Court and sought such relief in the Court of Appeals and now seek it here in this Court.

Petitioners' arbitration was heard in March of 1986. More than six months later in December of 1986, the arbitrator

rendered his decision. The Court of Appeals found at page A-54 of the opinion that Petitioners were aware of the alleged Union misconduct in handling the grievance before September 11, 1986, concurring with the District Court.

The District Court in its opinion at A-8 focused on what the Petitioners knew or should have known at their arbitrator's hearing when they were without their own counsel or right to their own counsel.

Petitioners without a right to have a member of its class present at the hearing were substantially prejudiced by being deprived of their remedy, based on knowledge imputed to them at the time of the hearing as to what they knew or should have known. Of course, they had no way of knowing at that time that they were damaged by the Union's breach of

duty until they read the arbitrator's decision of December of 1986.

The appearance of fairness and the concepts of due process require this Court to review the unjustice done to these Petitioners.

CONCLUSION

This case, if allowed to stand, betrays the fundamental legal principles of fairness in labor law arbitration.

It certainly is not what the Union employees bargained for when they included in their Collective Bargaining Agreement that their disputes with their employer were to be resolved by arbitration.

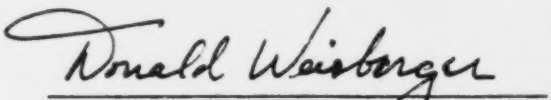
The issues raised in this case are central to labor arbitration cases and a decision by this Court in this case would go far to define the parameters of procedure in arbitration cases and would remove a cloud that now exists over Union employees' rights as to when they are permitted to proceed with their claim for breach of duty of fair representation, so that the substantive issues of

their claim can be adjudicated by the Courts below, rather than being barred by flexible accrual dates applied by the Courts at their caprice of the statute of limitations.

Admittedly, there are different classes of hybrid 29 USCS § 185 cases, but there is strong probability to believe that a plurality of them are straight forward cases filed after an arbitration. The adoption of a uniform accrual rule with respect to those cases settling once and for all that they may be brought more than six months after the arbitration award would go a long way to restore the sense of fairness that has been dissipated by the plethora of accrual rules that Courts apply to cases such as Petitioners. For the reasons set forth in this Petition, this Court is respectfully requested to grant

Petitioners' Petition For Writ of Certiorari.

Respectfully submitted,



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Attorney for Petitioners

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHEL ROBINSON, et al.	)	CASE NO. C87-571
	)	
Plaintiffs	)	JUDGE ALICE M. BATCHELDER
	)	
v.	)	
	)	
DINNER BELL MEATS, et al.	)	FILED
	)	1988 DEC-1
Defendants	)	PM 2:08

MEMORANDUM OF OPINION

This matter is before the Court on the motion of Defendants Dinner Bell Meats ("Dinner Bell") and First National Supermarkets, Inc. ("First National") for summary judgment, the motion of Defendant United Food and Commercial Workers Union Local 880 and the four individually named Union officials (collectively called "Union Defendants") to dismiss and/or for summary judgment, and the motion of Plaintiffs for partial summary judgment. The Court having

considered these motions, the parties' respective briefs and supporting documentation, as well as the complaint and answer and the applicable law, finds that the motion of Defendants Dinner Bell Meats and First National Supermarkets, Inc. for summary judgment is well-taken and is hereby GRANTED; that the motion of Union Defendants for summary judgment is well-taken and is hereby GRANTED; and that the motion of Plaintiffs for partial summary judgment is not well-taken and is hereby DENIED.

FACTS

Defendant Dinner Bell Meats operated a meat processing plant from about 1971 through June 30, 1985 at which time it permanently closed its plant. Defendant First National Supermarkets owns and operates grocery stores in the greater Cleveland area under the

name of Pick-n-Pay and is a joint owner of Dinner Bell Meats. Dinner Bell Meats was initially partially staffed by employees originally employed by Pick-n-Pay. A 1982-85 collective bargaining agreement between Dinner Bell Meats and the Defendant Union contained a provision which provided that each former Pick-n-Pay employee working at Dinner Bell had the right to transfer to a Pick-n-Pay store in the event that Dinner Bell closed. Plaintiffs are former Pick-n-Pay employees who sought to return to Pick-n-Pay when Dinner Bell closed in 1985 and were prohibited from doing so on the basis of waivers they signed in 1972 which stated:

> It is hereby understood that I relinquish my right to transfer to a Pick-n-Pay store.

As a result, Plaintiffs, along with other employees, filed a group grievance

claiming that they were denied their right under the collective bargaining agreement to return to Pick-n-Pay upon the closing of Dinner Bell Meats. The grievance was processed and an arbitration hearing was held on March 20, 1986, at which Arbitrator Cohen determined that Plaintiffs had waived their right under the collective bargaining agreement to transfer to a Pick-n-Pay store in the event that Dinner Bell closed. The arbitrator set out the basis for his determination in an Opinion and Award, denying Plaintiffs' grievance.

Plaintiffs commenced the instant action on March 11, 1987, alleging that Defendant Dinner Bell Meats breached the collective bargaining agreement in effect between Dinner Bell Meats and the Union, that the Union and the four

union officials sued in their individual capacities breached the duty of fair representation in processing Plaintiffs' grievance in presenting their case at the arbitration hearing, and that Plaintiffs are therefore entitled to have the arbitration award rendered by Hyman Cohen vacated.

The Union and Dinner Bell Meats and First National Supermarkets, Inc. have filed motions for summary judgment, contending that there are no genuine issues of material fact and that they are entitled to judgment as a matter of law on the issues of the statute of limitations, the individual liability of each Union defendant, and the Union's alleged breach of its duty of fair representation. Plaintiffs have moved for partial summary judgment on the issue of the

Union's breach of its duty of fair representation and have requested an order vacating the arbitration award.

I. STATUTE OF LIMITATIONS

Plaintiffs have asserted a cause of action under the United States Arbitration Act, 9 U.S.C. §1, et seq. However, no cause of action is maintainable under the Arbitration Act because this case is governed by Section 301 of the Labor Management Relations Act.(1)

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(1) Miller Brewing Co. v. Brewery Workers Local Union No. 9 AFL-CIO, 739 F.2d 1159, 1162 (7th Cir. 1984), cert. denied 469 U.S. 1160 (1985). ("[S]ection 301 was enacted long after the Arbitration Act and deals specifically, as the Arbitration Act does not, with labor contracts; it therefore supersedes, within its domain, the standards of the earlier Act.")

Since Plaintiffs allege both a breach of the collective bargaining agreement by Defendant Dinner Bell Meats and a breach of the duty of fair representation by the Union, this type of action is a hybrid action for which the statute of limitations is six months as applied to unfair labor practice claims under 10(b) of the National Labor Relations Act, 29 U.S.C. §160(b). DelCostello v. Intern. Bhd. of Teamsters, 462 U.S. 151 (1983). In a hybrid §301 unfair representation claim, the statute of limitations begins to run when the "claimant knows or should have known of the union's alleged breach of its duty of fair representation." Dowty v. Pioneer Rural Elec. Co-op., Inc., 770 F.2d 52, 56 (6th Cir. 1985), cert. denied 474 U.S. 1021 (1985).

Therefore, Plaintiffs must make a showing of Union misconduct of which they first became aware after September 11, 1986, the date six months prior to the filing of this action. Plaintiffs' complaint alleges union misconduct of which they were aware, with the exception of the Union's refusal to appeal the arbitration award and the arbitrator's consideration of the 1972 waivers, which occurred on March 20, 1986, either before or during the arbitration hearing. Specifically, Plaintiffs knew before the hearing that only one arbitrator would hear the case. Further, they were aware during the hearing that they were not in attendance and that not all of them would testify. Thus, with the exceptions noted above which the Court will consider later, the Plaintiffs' claims

are barred by the six month statute of limitation.

Plaintiffs' claim under 29 U.S.C. §411(A)(2), §101(A)(2) of the Labor Management Reporting and Disclosure Act (LMRDA) also arising from their inability to attend or participate in the hearing, is similarly subject to the six month statute of limitations set forth in §10(b) of the NLRA. Adkins v. Intern Union of Elec., Radio & Mach. Workers, AFL-CIO-CLC, 769 F.2d 330 (6th Cir. 1985). This §101(A)(2) claim, like the §301 claim, is barred by the statute of limitations.(2)

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(2) Moreover, until the filing of this action, Plaintiffs never objected to the Union's conduct which they now allege violated the duty of fair representation. It is "well settled that defects in proceedings prior to or during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of

Even were the Court to find that Plaintiffs' claims are not time barred by the statute of limitations, the Court finds that those claims, as well as the two which may not be time-barred, are without merit, and that the Union and Company are entitled to judgment as a matter of law. See, infra.

II. INDIVIDUAL LIABILITY OF UNION DEFENDANTS

Defendants Joseph Madzelonka, John R. Bartlett, Raymond J. DeSantis and Dan Welch move this Court to dismiss the complaint against them pursuant to Rule 12 of the Federal Rules of Civil

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the defect." Order of Ry. Conductors and Brakemen v. Clinchfield R. Co., 407 F.2d 985, 988 (6th Cir. 1969), cert denied 395 U.S. 841 (1969). This is especially applicable under the allegations which include the arbitrator's

Procedure and/or to grant summary judgment in their favor on the grounds that they cannot be held liable in their individual capacities.

Plaintiffs allege that these Union Defendants both breached their duty of fair representation under §301 and violated Plaintiffs' rights as secured by §102 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §412.

The standard governing an action by union employees against the union and its officers acting in their capacities as union representatives is set forth in §301 of the Labor-Management Relations Act which in pertinent part provides:

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bias or conflict of interest. Morris v. Warner-Continental, Inc., 466 F.2d 1185, 1188 (6th Cir. 1972), cert. denied 411 U.S. 965 (1973).

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.
>
> 29 U.S.C. 185(b).

The United States Supreme Court in Atkinson v. Sinclair Refining Co., 370 U.S. 238, 248 (1962) held that §301 exempted agents and members of unions from personal liability for judgments against the union. Atkinson has been extended to actions against union officers for breach of the duty of fair representation. Marsh v. United States Steel Corporation, No. C85-793 (N.D. Ohio 1985); Tisler v. LTV Corporation, No. C85-2697 (N.D. Ohio, 1985). Thus, Plaintiffs may not maintain an action against these individual defendants under §301.

Plaintiffs also seek to impose liability upon these individual defendants pursuant to §102 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. §412. Section 102 enables union members to seek redress for violations of rights secured by the statute. However, where a union officer acts within his official capacity to discharge his duty, he cannot be held individually liable under Section 102. A union official becomes personally liable only when he acts outside his authority. Nix v. Fulton Lodge No. 2 of Intern. Ass'n. of Machinists and Aerospace Workers, 262 F.Supp. 1000, 1008 (N.D. Ga. 1967), aff'd. in part, 415 F.2d 212 (5th Cir. 1969). As Plaintiffs have alleged that Madzelonka, Bartlett, DeSantis and Welch were acting only

within their official union capacities, these defendants may not be held personally liable under §102. Accordingly, the motion of Defendants Madzelonka, Bartlett, DeSantis and Welch to dismiss is GRANTED, and they are hereby DISMISSED.

III. BREACH OF THE DUTY OF FAIR REPRESENTATION

As an initial matter, this Court must be mindful of the fact that it is not the Court's function to review the merits of every construction of the contract. It is the arbitrator's function to interpret the collective bargaining agreement. United Steelworkers of America v. Enterprise W. and C. Corp., 363 U.S. 593 (1960).

In only limited instances will the Court vacate an arbitrator's decision:

> [A]s long as the arbitrator is even arguably construing or

> applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

United Paperworkers Intern. Union v. Misco, Inc., 108 S.Ct. 364, 371 (1987).(3)

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(3) The Sixth Circuit has addressed this issue and also concluded that:

> In the context of a labor contract, a court will not vacate an arbitrator's decision unless it cannot, in any rational way, be derived from the collective bargaining agreement.

Knollwood Cemetery Ass'n v. United Steelworkers of America, 789 F.2d 367, 369 (6th Cir. 1986) (citing United Steelworkers v. American Smelting and Refining Co., 648 F.2d 863, 867 (3rd Cir. 1981), cert. denied 454 U.S. 1031 (1981).

(4) The Sixth Circuit has stated:

> Even in the event of a union's breach of its duty of fair representation, an arbitration award is not quickly set aside. Kroger

One of the limited exceptions to the general prohibition on judicial review of arbitrator's decisions arises where the claim is for breach of the union's duty of fair representation. When an employee challenges a final arbitration award, he must first demonstrate that his union breached its duty of fair representation and that such breach "seriously undermines the integrity of the arbitral process" before a court will review the merits of the award. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 62 (1981).(4)

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> (defendant) correctly asserts that to vacate an arbitration award on this ground, there must be two findings. First, the Union must

The standard by which a Union's conduct is measured is found in Vaca v. Sipes, 386 U.S. 171, 190 (1967) in which the court held that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." The burden of demonstrating this breach "involves more than demonstrating mere errors in judgment." Hines, 424 U.S. at 571; Poole v. Budd Co., 706 F.2d 181, 183 (6th Cir. 1983); Ruzicka v. General Motors Corp., 649 F.2d 1207, 1212 (6th

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> have breached its duty of fair representation to the employee. Second, the breach of duty by the Union must have tainted the arbitrator's decision. The breach must have contributed to the ar-

Cir. 1983); Ruzicka v. General Motors Corp., 649 F.2d 1207, 1212 (6th Cir. 1981). Even when tactical decisions made in the course of arbitration are erroneous, Plaintiffs must demonstrate gross mistake or inaction without a rational explanation. Poole, 706 F.2d at 184. The Supreme Court has recognized that in cases where a union has exhausted the contractual grievance procedure on behalf of an employee by taking a case to arbitration, the burden on the employee is increased:

> It is true that Vaca dealt with a refusal by the union to process a grievance. It is also true that where the union actually utilizes the grievance and arbitration procedures on behalf of the

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> bitrator's making an erroneous decision.

> employee, the focus is no longer on the reasons for the union's failure to act but on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings.
>
> Hines, 424 U.S. at 567.

Thus, an employee seeking to overturn an arbitration award must prove that his union breached its duty of fair representation and that such breach caused the arbitrator to reach an erroneous decision.

In the instant case, Plaintiffs allege various actions by the union which they claim demonstrate a breach of its duty of fair representation. Each of these claims must be specifically addressed.

1. The Timeliness with which the Union Processed the Grievance to Arbitration.

Plaintiffs allege that the Union intentionally delayed the arbitration hearing to force them to settle. The collective bargaining agreement, however, does not provide a time frame for appealing the grievance to arbitration and it is apparent from the record that the parties made an attempt to schedule the arbitration hearing on a date which satisfied the schedules of all concerned parties. Thus, Plaintiffs' allegation as to the untimeliness of the arbitration hearing lacks merit and will not support their claim of breach of the duty of fair representation.

FOOTNOTE 4 CONTINUED FROM PAGE ___--

Wood v. Intern. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 406, 807 F.2d 493,500 (6th Cir. 1986), cert. denied, 107 S.Ct. 3232 (1987).

2. The Union's Agreement to Proceed with One Impartial Arbitrator.

Plaintiffs allege that the Union Defendants breached their duty of fair representation by departing procedurally from Article X of the 1982 Collective Bargaining Agreement by selecting one impartial arbitrator as opposed to three as contemplated by the collective bargaining agreement. In this case, the parties agreed to select an impartial arbitrator by alternatively striking names from a panel of arbitrators submitted by the Federal Mediation and Conciliation Service until one last name remained.

Deviation from the contractual composition of an arbitration board does not necessarily support a claim for a violation of the duty of fair representation. Ness v. Safeway Stores,

Inc., 598 F.2d 558, 560 (9th Cir. 1979); Ash v. United Parcel Service, Inc., 800 F.2d 409, 411 (4th Cir. 1986). It is permissible to deviate from the contractually required composition so long as the parties agree and no prejudice results to the grievants. Id. In the instant case, the arbitrator was appointed pursuant to the parties' express agreement and the Plaintiff has not shown that any prejudice resulted from the decision to employ only one impartial arbitrator. Thus, Plaintiffs' allegation as to a breach of duty resulting from the appointment of one impartial arbitrator is without merit.

3. Plaintiffs' Allegations as to the Arbitrator's Bias.

Plaintiffs allege that the Union breached its duty of fair representa-

tion when it agreed to the appointment of Hyman Cohen as arbitrator. Plaintiffs base their allegation on Hyman Cohen's position as a law professor at Cleveland Marshall Law School and the fact that the dean of this law school is the brother of one of the chief operating officers at defendant Pick-n-Pay and at one time its former president.

"The mere appearance of bias that might disqualify a judge will not disqualify an arbitrator," Florasynth, Inc. v. Pickholz, 750 F.2d 171, 173-74 (2nd Cir. 1984); Pitts v. Hotel Ass'n of New York City, Inc., 806 F.2d 419, 423 (2nd Cir. 1986); Hunt v. Mobil Oil Corp., 654 F.Supp. 1487, 1497 (S.D.N.Y. 1987). Rather, to set aside an award on the basis of arbitrator partiality, "[t]he interest or bias . . . must be direct, definite and capable of demon-

stration rather than remote, uncertain, or speculative." Sidarma Societa Italiana, DiArmamento Spa, Venice v. Holt Marine, Indus., Inc., 515 F.Supp. 1302, 1307, aff'd without opinion, 681 F.2d 802 (2nd Cir. 1981), Tamari v. Bache Halzy Stuart Inc., 619 F.2d 1196, 1200 (7th Cir. 1980), cert. denied 449 U.S. 873 (1980).

Professor Cohen is a well-respected and experienced arbitrator. Plaintiffs' allegations of his bias based on his affiliation with the Cleveland Marshall Law School for which the dean is the brother of an officer at Pick-n-Pay is far too remote and speculative to support a claim of bias. Without more shown, no reasonable person would conclude that Cohen was biased and thus Plaintiffs' allegations are insufficient to maintain this claim.

4. Plaintiffs' Allegation as to the Union's Failure to Disclose their Substantial Stock Position in the Corporate Defendants Prior to Arbitration.

The evidence in the instant case is uncontroverted that at no time did the Union own any stock in Defendant Dinner Bell Meats. Furthermore, although the Union did own a small number of shares in Defendant First National, these shares were purchased in order to obtain information as a stockholder that it otherwise could not obtain. Moreover, these shares were sold prior to the arbitration hearing. Thus, Plaintiffs' allegation that the Union breached its duty by failing to disclose its stock position in the corporate defendants is without merit.

5. Plaintiffs' Allegation that the Union Breached its Duty by Failing to Name First National as a Party to the Arbitration.

Plaintiffs contend that the Union was required to seek a determination in Federal District Court as to whether First National was liable under the Collective Bargaining Agreement as a non-signatory thereto prior to proceeding to arbitration. In the instant case, Defendant First National Supermarkets had admitted that it is a joint employer with Dinner Bell Meats, Inc. and consequently would be bound by the arbitrator's award. Therefore, there was no reason for the Union to sue First National to seek a declaratory judgment that it would be bound by the arbitrator's decision prior to the hearing. Accordingly, Plaintiffs' allegation is without merit.

Plaintiffs further allege that the failure to compel First National's joinder as a party to the hearing contributed to an erroneous decision by the arbitrator. Plaintiffs have failed to produce any evidence whatsoever to support this contention and the Court finds that Plaintiffs have failed to meet their burden of providing evidence sufficient to raise a genuine issue of material fact.

6. Plaintiffs' Allegation that the Union Violated its Duty of Fair Representation through Actions of its Attorney during the Arbitration Hearing.

Plaintiffs allege that the Union's attorney did not permit them to sit at the trial table or participate in the arbitration and that this constituted a breach of the Union's duty of fair representation. Plaintiffs further

allege that the Union breached its duty of fair representation when Mr. Oberdank, the Union attorney, decided not to call all of the Plaintiffs as witnesses in the arbitration hearing.

In addressing both of these allegations, this Court adheres to the premise that federal courts are extremely reluctant to question the tactical decisions of Union representatives in presenting an employee's grievance at an arbitration hearing. As stated by the court in Ferdnance v. Automobile Transport, Inc., 460 F.Supp. 1206, 1211 (E.D. Mich. 1978):

> While the Court might agree that the Union could have used a more effective strategy or more persuasive arguments before the Joint Committee, that clearly is an improper basis upon which to rest a breach of the fair representation of duty.

Thus, courts will not interfere with honestly made tactical decisions of union representatives including the determination of which witnesses to call at hearing. Hardee v. North Carolina Allstate Services, Inc., 537 F.2d 1255, 1258 (4th Cir. 1976); Baker v. R.H. Macy & Co., Inc., 519 F.Supp. 657, 662, n.4 (E.D.N.Y. 1981); Antonaros v. Norfolk and Western Ry. Co., 641 F.Supp. 193, 197 (S.D. Ohio 1986).

In cases where a Union elects to use an attorney, courts give the attorney the same wide latitude possessed by union representatives. Johnson v. Jos. Schlitz Brewing Co., 581 F.Supp. 338, 344 (M.D.N.C. 1984), judg. aff'd., 765 F.2d 138 (4th Cir. 1985). For Plaintiffs to establish a breach of the Union's duty of fair representation based on the Union attorney's tactical

decisions at the hearing, they must present affirmative evidence which establishes that those tactical decisions were without rational basis. Antonaros, 641 F.Supp. at 197; Poole, 706 F.2d at 183-84.

The initial motion to sequester all witnesses, including the grievants, was made at the beginning of the arbitration hearing by Marc J. Bloch, the attorney representing the Company defendant. Lawrence M. Oberdank, counsel for the Union, objected to the sequestration, but the arbitrator granted the company's motion to sequester the witnesses. Thereafter, by allowing Plaintiffs to be present at the arbitration hearing, Mr. Oberdank would have been precluded from calling them as witnesses. He was unsure if any of the

grievants' testimony would be required in addition to that of the grievants he was intending to call, and therefore he made the decision to have all of them sequestered as witnesses during the hearing. Plaintiff has produced no evidence that this decision was without a rational basis and the Court finds this tactical decision to be well within the latitude of Mr. Oberdank's position as Union counsel.

Furthermore, the Court finds that the Union attorney's decision not to call Plaintiffs Robinson, Caraballo and Davis was rationally based and Plaintiff has produced no evidence to the contrary. This decision was a strategic one based on counsel's judgment that another witness, Shirley Hill, had better recollection of the facts pertaining to the execution of the waivers.

Even assuming, arguendo, that this tactical decision was erroneous, such error would have been merely an error in judgment, and is insufficient to constitute a breach of the duty of fair representation. Hines, 424 U.S. at 570-71; Ruzicka, 649 F.2d at 1212.

In order to present Plaintiffs' case at arbitration, the Union retained two experienced labor attorneys. The record clearly reflects that these attorneys vigorously prosecuted Plaintiffs' grievance in accordance with the Union's duty of fair representation. Mr. Oberdank's actions during the hearing included making a thorough opening statement, introducing testimony through Union witnesses, cross-examining Company witnesses, making evidentiary objections, and submitting a post-hearing brief. These actions can hardly be viewed as

"arbitrary, discriminatory, or in bad faith." Vaca 386 U.S. at 190. Accordingly, Plaintiffs' claim that the Union breached its duty of fair representation in presenting their claims at the arbitration hearing is without merit.

7. Plaintiffs' Allegation that the Union Acted in Bad Faith when it Permitted the Arbitrator to Consider Waivers Executed by Plaintiffs in 1972.

Plaintiffs allege that the Union acted in bad faith when it permitted a 1972 waiver of rights to transfer back to Pick-n-Pay signed by Plaintiffs to be considered as part of and controlling the 1982 contract. This allegation is unfounded as the Union attorney, Mr. Oberdank, objected to the introduction of the waivers into evidence, but his objection was overruled.

Thus, Plaintiffs' allegation that the Union improperly permitted the introduction of the waivers is without merit.

Plaintiffs further allege that the Union's failure to keep the 1972 waivers out of the arbitration proceedings contributed to the arbitrator's making an erroneous decision, in that the arbitrator based his award on evidence that was outside the scope of the arbitration proceeding, viz, the waivers, thus exceeding his authority with respect to the interpretation or application of the substantive provisions of the collective bargaining agreement. It is well established that federal courts will defer to the judgment of the arbitrator so long as his or her decision "draws its essence from the collective bargaining agreement." United Steelworkers, 363 U.S. at 597. In the instant case, the

parties entered into a series of collective bargaining agreements. These agreements provided that after a ninety day period the employee "will relinquish all seniority rights with Pick-n-Pay but will be given credit for his full seniority at Pick-n-Pay by the company, provided, that if there should subsequently be a reduction in force which would result in his layoff by the Company, he shall be entitled to restoration of his seniority as of such date at Pick-n-Pay."

In interpreting the contractual provision regarding these transfer rights, the arbitrator took into consideration a side agreement, specifically the 1972 waivers. Although these waivers had not been expressly incorporated into subsequent collective

bargaining agreements, neither had the waivers been expressly disavowed or nullified by the subsequent agreements; Arbitrator Cohen determined that they still governed the parties' rights under the transfer provision and that the Plaintiffs had effectively waived their contractual right to return or transfer to a Pick-n-Pay store after Dinner Bell closed. This Court cannot characterize this decision as not, in any rational way, being derived from the collective bargaining agreement. Knollwood Cemetery, 789 F.2d at 369. See also Local 10 v. RCA Global Communications, 124 L.R.R.M. 2349 (S.D. N.Y. 1986) (Court rejects employer's effort to overturn arbitrator's award on theory that arbitrator had exceeded his authority by basing his award on a side agreement not incorporated into the applicable

collective bargaining agreement.) A review of Arbitrator Cohen's Opinion and Award clearly indicates that he carefully considered and interpreted the applicable provisions of the collective bargaining agreement. Accordingly, Plaintiffs' allegations that the Union breached its duty of fair representation by permitting these waivers to be introduced is unfounded and does not support a claim for breach of the duty of fair representation or suffice as a ground to vacate the arbitrator's award.(5)

---

(5) The Court has also considered the Plaintiffs' estoppel argument against First National Supermarkets and finds it meritless as a matter of law. The Court has also considered Count 3 of Plaintiffs' Complaint although the parties have not raised this claim in their motions. It is clear that this claim is part and parcel of the issues raised in the arbitration proceeding

8. Plaintiffs' Allegation that the Union Violated its Duty of Fair Representation in Deciding not to Appeal the Arbitrator's Award to Federal Court.

In the case at hand, the Union inquired as to the possibility of an appeal and Mr. Oberdank responded that an appeal would not be successful. The Seventh Circuit has held that a breach of the duty of fair representation suit cannot be based upon a union's failure to appeal an arbitrator's decision. Freeman v. Local Union No. 135, Chauffeurs, Teamsters, Warehousemen and Helpers, 746 F.2d 1316, 1321-22 (7th Cir. 1984). Other courts have held, in light of their limited role in reviewing labor

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and may not be separately maintained outside Plaintiffs' motions to vacate the arbitrator's award. It is hereby DISMISSED.

arbitration awards, that such actions may be allowed only in extreme circumstances constituting blatant unfairness. Sear v. Cadillac Auto. Club of Boston, 654 F.2d 4, 7 (1st Cir. 1981); Finn v. Yellow Freight System, 120 L.R.R.M. 2101, 2105 (E.D. Pa. 1983).

In the instant case, Plaintiffs have failed to produce any evidence that Arbitrator Cohen was biased, that he exceeded his authority, or that his decision was procured by means of fraud. Consequently, Plaintiffs cannot show that the Union's decision not to appeal the decision was made without any rational basis. The Union's decision was a matter of judgment, and even negligence in the exercise of such judgment is insufficient to establish a breach of the union's duty of fair representation.

9. Plaintiffs' Allegation that they Possess a Statutory Right Pursuant to 29 U.S.C. §411(a)(2) to be Present at the Arbitration Hearing.

It is also Plaintiffs' position that they possess a statutory right pursuant to 29 U.S.C. §411(A)(2) to assemble in the room where their arbitration took place at the time of the hearing. Plaintiffs rely on the right to freedom of speech and assembly pursuant to §101(A)(2) of the LMRDA, 29 U.S.C. §411(A)(2) which states:

> Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views upon candidates in election of the labor organization or upon business properly before the meeting. . . . (emphasis supplied.)

Their reliance on 29 U.S.C. §411-(A)(2) is misplaced. The purpose of Title I of the LMRDA which includes §411 is to establish union member's rights to participate in the union decision making process.

It is clear that Section 411(A)(2) pertains to members' rights to participate in internal union affairs and that Plaintiffs' attempt to extend these statutory rights beyond the context of internal union affairs to the grievance process must fail.

From the foregoing, it is clear that Plaintiffs cannot sustain their burden of presenting affirmative evidence from which a reasonable trier of fact could conclude that the Union breached its duty of fair representation and that such breach contributed to an

erroneous arbitration decision. Accordingly, the Union Defendants are entitled to judgment as a matter of law and Plaintiffs' Complaint as to them is hereby DISMISSED.

IV. BREACH OF THE COLLECTIVE BARGAINING AGREEMENT

Plaintiffs allege that Defendant Dinner Bell Meats breached the collective bargaining agreement in effect by failing to offer them positions at Pick-n-Pay Supermarkets (a division of First National Supermarkets, Inc.) after Dinner Bell Meats closed in July of 1985. The arbitrator having determined this issue in his Opinion and Award, and the Plaintiffs having failed to produce any evidence that would justify vacating that Opinion and Award, Defendants Dinner Bell Meats and First National Supermarkets, Inc. are entitled to judg-

ment as a matter of law on this issue. Accordingly the Motion of those Defendants for Summary Judgment is hereby GRANTED and the complaint against them is hereby DISMISSED.

V. PLAINTIFFS' MOTION TO VACATE THE ARBITRATION AWARD AND MOTION FOR PARTIAL SUMMARY JUDGMENT

For all of the reasons stated in its discussion of the Union Defendant's motion for summary judgment on the claim of breach of duty of fair representation, the Plaintiffs' motion for an order vacating the arbitration award and for partial summary judgment on the issue of the Union's breach of its duty of fair representation is without merit.

Plaintiffs finally contend that by executing the Memorandum of Agreement (closure agreement) dated June 27, 1985, the Union legally extinguished Plain-

tiffs' rights against Dinner Bell Meats. This contention is not supported. The issue of the group grievance was not included as part of the Memorandum of Agreement, but was arbitrated. After the signing of the Memorandum of Agreement and prior to the arbitration hearing, several grievants settled their claims and were paid a sum of money. Certainly if the grievants' claims had been legally extinguished, these monies would not have been paid and neither side would have gone through the expense of arbitration. Accordingly, the group grievance was not affected by the Memorandum of Agreement and Plaintiffs' allegation is without merit.

For the foregoing reasons the Court hereby DENIES Plaintiffs' Motion to Vacate the Arbitration Award and

Motion for Partial Summary Judgment.

IT IS SO ORDERED.

Dated this 1st day of December, 1988.

/s/ Alice M. Batchelder
ALICE M. BATCHELDER
UNITED STATES DISTRICT JUDGE

FILED
1988 DEC-1
PM 2:08

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ETHEL ROBINSON, et al.	)	CASE NO.
	)	C87-571
Plaintiffs	)	
	)	JUDGE ALICE
v.	)	M. BATCHELDER
	)	
DINNER BELL MEATS, et al.	)	
	)	
Defendants	)	

O R D E R

A Memorandum of Opinion having been issued herein this day, for the reasons stated therein the motions of defendants for summary judgment are granted; the motion of plaintiff for partial summary judgment is denied, and this case is DISMISSED.

IT IS SO ORDERED.

Dated this 1st day of December, 1988.

/s/ ALICE M. BATCHELDER
ALICE M. BATCHELDER
UNITED STATES DISTRICT
JUDGE

FILED
OCTOBER 05 1989
LEONARD GREEN, Clerk

NO. 89-3023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ETHEL ROBINSON, BETTY HICKS, EDWARD DAVIS, TED IWASZKIW, and SANTOS CARABALLO,	NOT RECOMMENDED FOR FULL-TEXT PUBLICATION ...
Plaintiffs-Appellants,	On Appeal from the United States District Court for the Northern District of Ohio.
v.	
DINNER BELL MEATS, UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 880, JOSEPH MADZELONKA, RAY DeSANTIS, JOHN R. BARTLETT, DAN WELSH, AND FIRST NATIONAL SUPERMARKETS, INC.,	
Defendants-Appellees.	

Before: KENNEDY and WELLFORD, Circuit Judges; and LIVELY, Senior Circuit Judge.

PER CURIAM. Appellants appeal the District Court's grant of summary judgment in favor of appellees in this collective bargaining case. The Dis-

trict Court found appellants' actions barred by the statute of limitations. Because we agree, we affirm.

The facts are not in dispute. Appellants were formerly employees of Pick-N-Pay stores, where they worked until about 1971, when they transferred to Dinner Bell Meats, Inc. Pick-N-Pay was owned and operated by First National Supermarkets, Inc. Appellants worked at Dinner Bell until about 1985, when it permanently closed. Appellants were all members of the United Food and Commercial Workers Union, Local No. 880.

The Collective Bargaining Agreement at issue provided that any employee wishing to transfer to Dinner Bell could do so while retaining his or her seniority with Pick-N-Pay for ninety days after Dinner Bell opened. After

ninety days, he or she would lose all seniority rights with Pick-N-Pay, but would be given credit at Dinner Bell for seniority accumulated at Pick-N-Pay, "provided that if there should subsequently be a reduction in force which would result in his layoff by the Company [Dinner Bell], he shall be entitled to restoration of his full seniority as of such date at Pick-N-Pay." Appellants signed a waiver in 1972 which stated "I HEREBY RELINQUISH MY RIGHT TO RETURN TO PICK-N-PAY." When Dinner Bell closed in 1985, appellants attempted to exercise their right to return to Pick-N-Pay. They were denied transfer on the basis of the waiver and as a result filed a grievance. An arbitration hearing was held on March 20, 1986. First National

Supermarkets, Inc., which owned Dinner Bell Meats, was not joined as a party to the arbitration. The union was represented by Lawrence Oberdank. He discussed his arbitration strategy with the grievants before the hearing, participated in the hearing, and filed a post-arbitration brief. The arbitrator found that the grievants waived their right to return to Pick-N-Pay by signing the waiver.

Suit was then brought in federal court to vacate the arbitration award. Appellants claimed the union breached its duty of fair representation on several grounds, including the fact that First National was not joined as a party at arbitration. They sought reinstatement and damages against Dinner Bell Meats, and First National Supermarkets,

Inc. (Pick-N-Pay Supermarkets Division). Appellants also sued the union and four union officials individually. The court granted appellees' motion for summary judgment on statute of limitations grounds, and denied appellants' motion for partial summary judgment. Appellants filed a motion for reconsideration based on an affidavit obtained after these proceedings from a Ward Boykin, stating that there were verbal assurances made to him when he signed the waiver that it would not impinge upon former Pick-N-Pay employees' rights to return to Pick-N-Pay with seniority earned at both Pick-N-Pay and Dinner Bell if there was a reduction in the work force at Dinner Bell. The affidavit also stated that the waiver was circulated with the approval of the union.

We affirm on the grounds that appellants' claims are barred by the statute of limitations.[1] Because appellants asserted both a breach of the collective bargaining agreement ("agreement") by Dinner Bell as well as a breach of the duty of fair representation by the union, the suit is subject to a six-month statute of limitations. See DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983). The limitations period begins running when the "claimant knows or should have known of the union's alleged breach of its duty of fair representation." Dowty v. Pioneer Rural Elec. Coop., Inc., 770 F.2d 52,

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[1]The District Court also noted that appellants failed to object to any of the union conduct which they now claim is a violation of the union's duty of

56 (6th Cir.), cert. denied, 474 U.S. 1021 (1985). Similarly, appellants' claim under 29 U.S.C. §§ 411(A)(2) and 101(A)(2) of the Labor Management Reporting and Disclosure Act, arising based on their inability to attend the arbitration hearing, is controlled by a six-month statute of limitations. See Adkins v. International Union of Elec., Radio & Mach. Workers, 769 F.2d 330 (6th Cir. 1985). The District Court found that appellants failed to assert

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FOOTNOTE 1 CONTINUED FROM PREVIOUS PAGE:

fair representation. It is "well settled that defects in proceedings prior to or during arbitration may be waived by a party's acquiescence in the arbitration with knowledge of the defect." Order of Ry. Conductors and Brakemen v. Clinchfield R.R. Co., 407 F.2d 985, 988 (6th Cir.), cert. denied, 396 U.S. 841 (1969).

their claims within six months of becoming aware of the union's breach. Appellants were aware of the alleged union misconduct in handling their grievance before September 11, 1986, which was the date six months prior to the filing of their lawsuit.[2] The only misconduct that was therefore not time-barred was the union's failure to appeal the arbitration award and the arbitrator's consideration of the 1972 waivers. However, appellants do not appeal the District Court's ruling with regard to those claims.

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[2]Appellants asserted the union breached its duty in the following ways: (1) by not timely processing the grievance to arbitration; (2) by agreeing to proceed with one arbitrator; (3) by agreeing to use an arbitrator who was a professor at a law school whose dean is the brother of a chief operating officer at Pick-N-Pay making the arbitrator biased; (4) by not disclosing their stock position in the corporate defendants prior to arbi-

On appeal, appellants fail to directly contest the District Court's ruling that their claims are time-barred. They at most argue that the union acted in bad faith by failing to disclose that First National Supermarkets, Inc. would not be made a party to the arbitration. They claim they had no notice of this

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FOOTNOTE 2 CONTINUED FROM PREVIOUS PAGE:

tration; (5) by failing to name First National as a party to arbitration; (6) by allowing the union attorney to prevent appellants from sitting at the table during arbitration and for not calling all of them as witnesses; (7) by allowing the arbitrator to consider waivers signed in 1972; (8) by not appealing the arbitrator's decision to federal court; and (9) by denying them their statutory right to assemble in the arbitration room at the time of the hearing. The District Court found, and we agree, that in addition to being barred by the statute of limitations, none of these claims presented a genuine issue of material fact and appellees were thus entitled to judgment as a matter of law.

until the arbitration occurred, and that the statute of limitations should be subject to equitable tolling because this concealment constituted a continuing tort. However, it is uncontested that First National Supermarkets agreed to be bound by any arbitration award against Dinner Bell. Marc Bloch, counsel for both Dinner Bell and First National, agreed with the union prior to arbitration that First National would be so bound. See Union Motion, Affidavit of Oberdank at 13 (Joint App. at 580); Company Motion, Affidavits of Block at 2 (Joint App. at 161); and Pollack at 2-3 (Joint App. at 158-59). Moreover, appellants never objected to the fact that First National was not a party to the arbitration. Affidavit of

Oberdank at 13-14 (Joint App. at 580-81). On appeal, appellants fail to show that it was necessary to join First National as a party to the arbitration, especially when it is uncontested that they would honor any award against Dinner Bell. Although appellants urge that we apply the doctrine of equitable tolling, appellants cannot predicate equitable tolling upon the failure to join an unnecessary party to the arbitration. We therefore affirm the District Court's judgment that the claims were barred by the statute of limitations.

Appellants lastly claim that they are entitled to severance pay if the District Court judgment is affirmed. We disagree. First, appellants' complaint made no mention of such relief. It is raised for the first time on appeal. Second, appellants have failed

to exhaust their contractual remedies with regard to that issue. See Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Anderson v. Ideal Basic Indus., 804 F.2d 950 (6th Cir. 1986). Appellants' attempt to claim entitlement to severance pay is untimely.

Accordingly, the judgment of the District Court is AFFIRMED.

No. 89-3023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

O R D E R

FILED
NOV 02 1989

ETHEL ROBINSON; BETTY HICKS; LEONARD EDWARD DAVIS; TED IWASZKIW; SANTOS CARABALLO

Plaintiffs-Appellants

v.

DINNER BELL MEATS; UNITED FOOD & COMMERCIAL WORKERS LOCAL 880; JOSEPH MADZELONKA, President; RAY DESANTIS, Exec. Vice-President; JOHN R. BARTLETT, Secretary-Treasurer; DAN WELSH, Recorder; FIRST NATIONAL SUPERMARKETS, INC., (Pick-n-Pay Supermarkets Division)

Defendants-Appellees

BEFORE: KENNEDY and WELLFORD, Circuit Judges; LIVELY, Senior Circuit Judge.

Upon consideration of the petition for rehearing filed by the appellants, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, jf
Leonard Green, Clerk

Mr. Donald Weisberger, Esq.
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Cleveland, OH 44113-2001